

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 31ST OCTOBER 2007 / 9TH KARTHIKA 1929

RSA.No. 923 of 2007()

AS.40/2003 of PRL.S.C., THALASSERY
OS.277/1998 of J.M.F.C., KUTHUPARAMBA
.....

APPELLANTS/APPELLANTS/PLAINTIFFS & DEFENDANTS 1 & 2:

1. THOTTUNKARA KUNHIKRISHNAN @ KARUNAKARAN,
S/O.KUNHIRAMAN, PAREMMAL HOUSE,
PANAKKAD THERU, THILLANKERI P.O.,
THALASSERY TALUK, KANNUR DISTRICT.
 2. ARAYAKKI KALYANI, W/O.KUNHIRAMAN,
-DO-
 3. THOTTUNKARA LAKSHMI, D/O -DO-
- BY ADV. SRI.K.V.SOHAN
SMT.SREEJA SOHAN.K.

RESPONDENTS/RESPONDENTS/DEFENDANTS 3 TO 9:

1. CHEMBAN JANAKI, D/O.SANKARAN,
PUTHIYA VEEDU, THILLANKERI P.O.,
THALASSERY TALUK, KANNUR DISTRICT.
2. THOTTUNKARA PRABHAKARAN,
S/O.JANAKI, -DO-
3. THOTTUNKARA VIJAYAN, S/O -DO-
4. THOTTUNKARA KALLYANI @ CHANDRI,
D/O -DO- -DO-
5. THOTTUNKARA SHYAMALA, D/O. -DO-
6. THOTTUNKARA RADHA, D/O -DO-
7. THOTTUNKARA SHYLAJA, D/O. -DO-

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
31/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

.....
R.S.A.No.923 OF 2007
.....

DATED THIS THE 31st DAY OF OCTOBER, 2007

JUDGMENT

Plaintiff and defendants 1 and 2 in O.S.277 of 1998 before Munsiff Court, Kuthuparamba are the appellants. Defendants are respondents. First Appellant instituted the suit seeking a decree for partition contending that second appellant/first defendant is the widow and first appellant and third appellant/second defendant are the children of deceased Thottumkara Kunhiraman. The plaint schedule property originally belonged to Thottumkara Kunhiraman. Appellants contended that Thottumkara Kunhiraman was living with first respondent/third defendant and respondents 2 to 7/defendants 4 to 9 are the legitimate children of Kunhiraman in first respondent and they did not inherit any right over the assets of Kunhiraman and being the legally wedded wife, only second appellant is entitled to a share along with their children appellants 1 and 3 and respondents are not entitled to any share.

2. Respondents 1 to 7 filed a joint written statement contending that Thottumkara Kunhiraman was not the husband of second appellant and appellants 1 and 3 are not the children

of KunhIRaman and there was no marriage between KunhIRaman and second appellant and first respondent is the legally wedded wife of KunhIRaman and their marriage was solemnised as per the customary rights and rituals and respondents 2 to 7 were born to first respondent in that relationship and respondents alone are entitled to inherit the properties of KunhIRaman. It was also contended that KunhIRaman had executed Ext.B17 will whereunder properties were bequeathed to respondents 2 to 4 and 7 and later respondents 2 to 4 and 7 assigned their right in favour of second respondent by release deed dated 14.10.1996 and appellants are not entitled to claim any share. Appellants 2 and 3 in their written statement admitted the plaint allegations and reiterated the same and claimed their share.

3. Learned Munsiff, on the evidence of PWs 1 & 2, Dws 1 to 5 and Exts.A1 to A8 and Exts.B1 to B17 and Exts.X1 to X2(a), dismissed the suit holding that first appellant failed to establish that second appellant was the legally wedded wife of KunhIRaman or that appellants 1 and 3 were born to second appellant in that marital relationship and therefore they are not entitled to inherit the properties of KunhIRaman. Appellants together challenged the decree and judgment before Sub Court,

Thalassery in A.S.40 of 2003. Learned Sub Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged by them in the second appeal.

4. Learned counsel appearing for appellants was heard. The argument of the learned counsel is that courts below did not appreciate the evidence in the proper perspective and appreciation of evidence was perverse. It was argued that there is no documentary evidence to prove the marriage of Kunhiraman either with second appellant or with first respondent and fact that appellants admitted that Kunhiraman was living with first respondent and respondents 2 to 7 were born to Kunhiraman in first respondent does not establish that there was a legal marriage between Kunhiraman and first respondent or that respondents 2 to 7 are the legitimate children of Kunhiraman. It was argued that marriage of Kunhiraman with second appellant was in 1947 and evidence should have been appreciated in the social set up prevailing at that period. It was argued that Kunhiraman was having "punam" cultivation and evidence of DW4, the brother of first respondent establish that Kunhiraman had gone along with him for "punam"

cultivation which was 65 kms away from the plaint schedule property and at that time first respondent accompanied Kunhiraman and respondents 2 to 7 the children were born in that relationship and first respondent was only a concubine and on the evidence courts below should have found that Kunhiraman had married second appellant and appellants 1 and 3 were born in that wedlock. Learned counsel also argued that Ext.A3 and A4 Birth Certificates of appellants 1 and 3 establish that Thottumkara Kunhiraman was the father of appellants 1 and 3 and courts below should have granted the decree sought for.

5. What was contended by appellants was that Thottumkara Kunhiraman had married second appellant Kalyani and appellants 1 and 3 were born in that wedlock. That case was denied by respondents. It was admitted by first appellant even in the plaint and appellants 2 and 3 in their written statement that respondents 2 to 7 were born to first respondent in Kunhiraman, though they qualify respondents 2 to 7 as illegitimate children of Kunhiraman and first respondent a concubine. As appellants are claiming a share in the plaint schedule property on the basis that second appellant is the widow and appellants 1 and 3 are the legitimate children of

Kunhiraman, burden is heavily on them to establish both the facts. The argument of learned counsel is that even though there is no documentary evidence to prove marriage of second appellant, that is the same case with the case of marriage of first respondent and courts below should not have relied on the evidence on the side of respondents to uphold their claim.

6. There is clear distinction. When respondents denied in toto the entire claim of appellants, both marriage of second appellant with Kunhiraman and that appellants 1 and 3 are the children of Kunhiraman, appellants unambiguously admitted that Kunhiraman was living with first respondent and respondents 2 to 7 were born to her in that relationship. The evidence also establish Kunhiraman died while he was residing with respondents and after the death of Kunhiraman, plaint schedule property is in the possession of respondents. In such circumstances, unless appellants establish the legal marriage between Kunhiraman and second appellant, and that appellants 1 and 3 are the children of Kunhiraman, they cannot succeed in the suit. Even the failure of first respondent to establish her marriage with Kunhiraman will not enable appellants to get a decree, on the facts and circumstances of the case.

7. The only evidence adduced by appellants to establish the marriage of KunhIRaman with second appellant is that of PW2, the nephew of KunhIRaman. As rightly found by courts below, even the year, month or date or place of the alleged marriage was pleaded. The only evidence adduced to prove the marriage was that of second appellant as DW1 and PW2 the nephew of KunhIRaman. The evidence of PW2 establish that he was only a boy aged 5 to 8 years at the time of alleged marriage. Trial Court and first appellate court, on appreciation of evidence of PW2, found that his evidence cannot be relied on and on his evidence, it is not possible to uphold the marriage alleged. Though learned counsel persuaded me to reappreciate the evidence, I do not find that appreciation of evidence of PW2 by courts below was perverse, warranting reappreciation of evidence or substitution of finding of this court to that of the courts below on such reappreciation of evidence, in exercise of the powers of this court under Section 100 of Code of Civil Procedure. It is clear that evidence of PW2 was appreciated in the proper perspective.

8. So also evidence of DW1 was properly appreciated by courts below. It was admitted by DW1 that there are documents

like ration card, establishing the fact that Kunhiraman was living with appellants. DW1 also deposed that Thottumkara Kunhiraman was shown as the head of the family in the ration card. In spite of this admission, no material was produced in support of the claim. Courts below has rightly drawn adverse inference for not producing the relevant records. The argument of learned counsel is that Ext.A3 and A4 show that Thottumkara Kunhiraman is the father of appellants 1 and 3. But courts below relied on the evidence of DW1 herself to hold that there is another Thottumkara Kunhiraman in the locality and identity of Thottumkara Kunhiraman seen in Ext.A3 and A4 as the father of respondents 2 to 7 was not established. It is in such circumstances, courts below found that appellants did not establish that second appellant is the widow of Kunhiraman or that appellants 1 and 3 are the children of Kunhiraman. The said factual finding entered into by courts below cannot be interfered by reappreciation of evidence as sought for by the learned counsel.

9. Though there is no documentary evidence to prove the marriage of first respondent with Kunhiraman, courts below on the admitted facts and evidence found that the long cohabitation

of Kunhiraman and first respondent and fact that respondents 2 to 7 were born in that relationship, establish that first respondent is the legally wedded wife and respondents 2 to 7 are the children in that wedlock. On the admitted facts and evidence, findings of the courts below on that aspect is also correct. Moreover, evidence establish that plaint schedule property is admittedly in the possession of respondents. Appellants specifically submitted before the courts below that they do not seek any relief as against respondents. No decree for recovery of possession of the property from respondents was also sought. In such circumstances, courts below rightly held that appellants are not entitled to any share in the plaint schedule property. As there is no substantial question of law involved, appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-